88-1582

Supreme Court, U.S.
FILED
MAR 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MELVIN O'CARROLL,
Petitioner

v.

CHAPARRAL AIRLINES, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI

MARCH H. COFFIELD
SEALE, STOVER, COFFIELD,
GATLIN & BISBEY
P. O. Box 480
Jasper, Texas 75951
(409) 384-3463

Counsel for Petitioner,
Melvin O'Carroll

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

QUESTION PRESENTED FOR REVIEW

WHETHER AN AIRLINE PASSENGER'S STATE-BASED REMEDY FOR COMMON LAW NEGLIGENCE AGAINST AN AIRLINE IS FEDERALLY PRE-EMPTED BY THE FEDERAL AVIATION ACT, 49 U.S.C.A. § 1301, *ET SEQ.* (SEE ESPECIALLY: 49 U.S.C.A. §§ 1305, 1506.)

PARTIES TO THIS PROCEEDING

The names of the parties to this proceeding are contained in the case caption.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	I
PARTIES TO THIS PROCEEDING	II
TABLE OF CONTENTS	III
TABLE OF AUTHORITIES	IV
OPINION AND DECISION IN THE COURT OF APPEALS	1
STATUTES INVOLVED IN THIS CASE	2
STATEMENT OF THE CASE	4
REASONS FOR ALLOWANCE OF THE WRIT	5
CONCLUSION AND PRAYER	9
CERTIFICATE OF SERVICE	11
APPENDIX:	
Opinion of the Court of Appeals	A-1
Judgment of the Court of Appeals	A-7
Opinion on Motion for Rehearing	A-9
Summary of the Record	A-11

TABLE OF AUTHORITIES

CASES

	Page
American Express Co. v. Teitel, 464 N.Y.S. 2d 947 (N.Y. Civ. Ct., 1983)	7
Brunwasser v. Trans World Airlines, Inc., 541 F. Supp. 1338 (W.D., Pa., 1982)	7
In Re Air Crash, 861 F.2d 814 (5th Cir., 1988)	8
In Re Air Crash Disaster, 635 F.2d 67 (2d Cir., 1980)	7
In Re Air Crash Disaster, 767 F.2d 1151 (5th Cir., 1985)	8
Lefkowitz v. Daro Chartours, Inc., 422 N.Y.S. 2d 146 (Ct. App., 1979)	7
Manfredonia v. American Airlines, Inc., 416 N.Y.S. 2d 289 (Ct. App., 1979)	7
Nader v. Alleghany Airlines, Inc., 426 U.S. 290 (1976)	6
O'Carroll v. Chaparral Airlines, Inc., 863 F.2d 11 (5th Cir., 1989)	1, A-1
Porter v. Southeastern Aviation, Inc., 191 F. Supp. 42 (M.D., Tenn., 1961)	7

STATUTES AND RULES

28 U.S.C.A. § 1254	2
28 U.S.C.A. § 1291	2
28 U.S.C.A. § 1322	2
28 U.S.C.A. § 2101(c)	2
49 U.S.C.A. § 1301, et seq.	1
49 U.S.C.A. § 1305	1, 2, 3, 7
49 U.S.C.A. § 1381	6
49 U.S.C.A. § 1421(b)	8
49 U.S.C.A. § 1506	1, 4, 5, 6
Rule 19, U.S.S.C.R.	11
Rule 20, U.S.S.C.R.	2
Rule 21, U.S.S.C.R.	11

TEXTS

Law of Torts, Prosser (1971 Ed.)	8
11 Tex. Jur. 3d (1981 Ed.)	8

MISCELLANEOUS

U.S. Code Cong. and Ad. News (1958)	5
U.S. Code Cong. and Ad. News (1961)	7
U.S. Code Cong. and Ad. News (1974)	7
U.S. Code Cong. and Ad. News (1978)	7

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MELVIN O'CARROLL,
Petitioner

v.

CHAPARRAL AIRLINES, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI

Petitioner, Melvin O'Carroll, prays that a Writ of Certiorari issue to review the Judgment of the Fifth Circuit Court of Appeals in this case.

OPINION AND DECISION IN THE COURT OF APPEALS

The Opinion (863 F.2d 11) and Judgment of the Fifth Circuit Court of Appeals, together with the Opinion and Order denying Petitioner's Petition for Rehearing, are printed in the Appendix.

JURISDICTION

The Trial Court's jurisdiction of this case arises from 28 U.S.C.A. § 1322. The Court of Appeals' jurisdiction is based on 28 U.S.C.A. § 1291.

Jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254. The Judgment of the Fifth Circuit Court of Appeals was entered on January 12, 1989. Petitioner's Petition for Rehearing was denied on February 9, 1989. This Petition is timely filed pursuant to 28 U.S.C.A. § 2101(c) and Rule 20, U.S.S.C.R.

STATUTES INVOLVED IN THIS CASE

49 U.S.C.A. § 1305 provides as follows:

"(a) PREEMPTION

"(1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

"(2) Except with respect to air transportation (other than charter air transportation) provided pursuant to a certificate issued by the Board under section 1371 of this title, the provisions of paragraph (1) of this subsection shall not apply to any transportation by air of persons, property, or mail conducted wholly within the State of Alaska.

"(b) PROPRIETARY POWERS AND RIGHTS

"(1) Nothing in subsection (a) of this section shall be construed to limit the authority of any

State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietary powers and rights.

"(2) Any aircraft operated between points in the same State (other than the State of Hawaii) which in the course of such operation crosses a boundary between two States, or between the United States and any other country, or between a State and the beginning of the territorial waters of the United States, shall not, by reason of crossing such boundary, be considered to be operating in interstate or overseas air transportation.

"(c) EXISTING STATE AUTHORITY

"When any intrastate air carrier which on August 1, 1977, was operating primarily in intrastate air transportation regulated by a State receives the authority to provide interstate air transportation, any authority received from such State shall be considered to be a part of its authority to provide air transportation received from the Board under subchapter IV of this chapter, until modified, suspended, amended or terminated as provided under such subchapter.

"(d) DEFINITION

"For purposes of this section, the term 'State' means any State, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, the Virgin Islands, and any territory or possession of the United States."

(Pub.L. 85-726, Title I, § 105, as added Pub.L. 95-504, § 4(a), Oct. 24, 1978, 92 Stat. 1708, and amended Pub.L. 98-443, § 9(u), Oct. 4, 1984, 98 Stat. 1709.)

49 U.S.C.A. § 1506 provides as follows:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."
>
> (Pub.L. 85-726, Title XI, § 1106, Aug. 23, 1958, 72 Stat. 798.)

STATEMENT OF THE CASE

This is a suit under Texas common law by Melvin O'Carroll (O'Carroll), a passenger, against Chaparral Airlines, Inc. (Chaparral), a common carrier, for negligence occurring on September 14, 1986, at Dallas-Fort Worth Airport (DFW) and the damages proximately caused thereby.

O'Carroll contends that Chaparral had a duty under Texas common law to exercise a high degree of care toward him in view of the passenger-carrier relationship that existed on the occasion in question. O'Carroll further contends that that duty was breached by Chaparral and its crew when:

(1) they accused O'Carroll of having an invalid ticket when in fact the ticket was admittedly valid;

(2) they accused O'Carroll of intoxication without justification; and,

(3) they had O'Carroll removed from the aircraft, arrested and jailed by airport police.

Finally, O'Carroll contends that the Texas common law under which this suit was filed and tried was not pre-empted by 49 U.S.C.A. § 1305. There is a complete

absence of any clear indication of Congressional intent to pre-empt the common law of the various states by such section. In addition, the provisions of 49 U.S.C.A. § 1506 clearly preserve O'Carroll's common law remedies.

REASONS FOR ALLOWANCE OF THE WRIT

As part of the "Federal Aviation Act of 1958," Congress enacted 49 U.S.C.A. § 1506, entitled "Remedies Not Exclusive," and quoted above. Of course, the references in this Section, as set forth in U.S.C.A., to "chapter" include the entire Federal Aviation Act, as shown by the language of the Act as passed in 1958.

> "REMEDIES NOT EXCLUSIVE
>
> "Sec. 1106. Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."
>
> (Public Law 85-726, Sec. 1106), *U.S. Code Cong. and Ad. News* (1958) at p. 931.

The contention that the Federal Aviation Act pre-empts state-based common law actions by passengers for airline negligence arises from the addition of § 1305 (quoted above) in the 1978 amendments to the Act.

However, § 1506 has not been repealed or amended since 1958.

It is submitted that the retention of § 1506, coupled with the complete absence of any stated Congressional intention that § 1305 pre-empts all state-based common law actions, indicate that such common law actions have not been pre-empted.

The effect of § 1506 has been assessed by this Court in *Nader v. Alleghany Airlines, Inc.,* 426 U.S. 290 (1976). In *Nader,* this Court found that there was no "absolute inconsistency" or "irreconcilable conflict" between a common law tort action for fraudulent misrepresentation by an air carrier (overbooking) and 49 U.S.C.A. § 1381. That Section gives authority to the Board to investigate and decide cases of "unfair or deceptive practices or unfair methods of competition" by air carriers and ticket agents. Nader's complaint asserted a common law claim for damages arising out of "deceptive practices" by Alleghany, as well as a statutory claim. 426 U.S. at p. 295. The Court noted, in response to the pre-emption defense made by the carrier, that:

> ". . . Under the circumstances, the common-law action and the Statute are not 'absolutely inconsistent' and may co-exist as contemplated by § (1506).
>
> * * *
>
> 'In sum, § (1381) confers upon the Board a new and powerful weapon against unfair and deceptive practices that injure the *public.* But it does not represent the only, or best, response to all challenged carrier actions that result in *private* wrongs." 426 U.S. at pp. 300, 303 (Insertions and Emphasis Added).

The action asserted here, and the remedy sought by O'Carroll, are "private" in nature. The events of September 14, 1986, directly affected and damaged O'Carroll's "private interests." Those interests are protected by Texas common law which imposes a duty on common carriers, such as Chaparral, to exercise a high degree of care toward their passengers.

See, also: *Manfredonia v. American Airlines, Inc.*, 416 N.Y.S. 2d 286 (Ct. App., 1979) at p. 290; *Lefkowitz v. Daro Chartours, Inc.*, 422 N.Y.S. 2d 146 (Ct. App., 1979) at p. 148; *American Express Co. v. Teitel*, 464 N.Y.S. 2d 947 (N.Y. Civ. Ct., 1983) at pp. 950, 951; *Brunwasser v. Trans World Airlines, Inc.*, 541 F. Supp. 1338 (W.D., Pa., 1982) at pp. 1356, 1356; *Porter v. Southeastern Aviation, Inc.*, 191 F. Supp. 42 (M.D., Tenn., 1961) at p. 43; and, *In Re Air Crash Disaster*, 635 F.2d 67 (2d Cir., 1980) at pp. 74-76.

The basic provisions of 49 U.S.C.A. § 1305 prohibit state or agency enactment and enforcement of laws, rules, regulations, standards or other provisions relating to rates, routes or services. Undoubtedly, Congress could and would have included "common law actions for negligence" in this list of prohibitions if that were what it intended. Obviously, it did not intend to pre-empt such actions, but sought only to prohibit the states or other Federal agencies from attempting to regulate airlines as to their "rates, routes or services." The continued presence of § 1506 in the statutory system underscores these clear limitations on the effect of § 1305, and the absence of Congressional intention to pre-empt private actions to remedy airline negligence.

Likewise, no mention is made in any of the relevant statements of legislative purpose that Congress intended, in any way, to pre-empt State common law by enacting these statutes or authorizing action by a Federal Board. See, e.g., *U.S. Cong. and Ad. News*, (1961) at pp. 520, 522, 2563-2566; (1974) at pp. 465, 3989; (1978) at pp. 1705, 1744, 3737, 3751, 3752, 3773-3775. Surely, if Congress had intended to wipe out State doctrines of

common law negligence, such a dramatic undertaking would at least have been mentioned somewhere.

The pre-emption argument in this case is centered on the claimed pursuit of "uniformity." That position conveniently ignores the fact that the common law of the various states *uniformly* holds carriers to a duty to exercise a high degree of care toward their passengers. See, e.g., *Law of Torts,* Prosser (1971 Ed.) § 34 at pp. 180-183. Texas is, of course, part of that uniformity. See, e.g., 11 *Tex. Jur. 3d* (1981 Ed.) "Carriers" § 160 at pp. 188, 189.

That argument also ignores the absence of any holding that Federal pre-emption has denied open courts to those damaged as a result of the Delta Airlines crash at Dallas-Fort Worth Airport and the Pan American World Airways crash near the New Orleans Airport, among many others. This Court can take judicial notice that cases arising out of those two incidents alone have already been tried or are awaiting trial with no contention of pre-emption. See, e.g., *In Re Air Crash Disaster,* 767 F.2d 1151 (5th Cir., 1985); *In Re Air Crash,* 861 F.2d 814 (5th Cir., 1988). Certainly, Melvin O'Carroll cannot be more of a concern to Federal authorities than the respective passengers aboard those fatal flights. Clearly, landings (Delta) and takeoffs (Pan American) are part of ". . . the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest . . ." 49 U.S.C.A. § 1421(b).

In the course of this incident, even uninvolved fellow passengers were arrogantly threatened with removal and jail by Chaparral's flight attendant simply because they were supportive of O'Carroll in his plight (Tr. Sup. A-16,

17; Tr. Sup. B-9). It is submitted that the Congress could never have intended to give air carriers an essentially free rein to abuse their passengers in the name of "safety"—the obvious end result would be just the opposite.

O'Carroll respectfully submits that the Texas law protecting passengers from common carrier negligence is not inconsistent with airline safety. In the absence of such common law protection, there would be a crazy-quilt of "protection vs. non-protection" based on whether you were an interstate airline passenger, an intrastate airline passenger, an airborne passenger or still sitting at the airport, a train passenger, a bus passenger, or any one of a myriad of combinations thereof. And, under the opposing position, a passenger damaged by airline negligence would be without any private remedy. Obviously, such a scheme would not encourage airline safety. The Texas law is consistent with, and directly compliments, the concept of air safety that prompted the passage of the Federal Aviation Act and its later amendments.

It is respectfully submitted that the Federal law arising under that legislation does not pre-empt the Texas law involved in this case and does not eliminate private causes of action for damages arising from airline negligence.

CONCLUSION AND PRAYER

Petitioner, Melvin O'Carroll, respectfully submits that the Federal Aviation Act does not pre-empt his private remedy under Texas common law for the negligence of Chaparral Airlines, Inc. Petitioner respectfully prays that this Court issue a Writ of Certiorari to review the Judg-

ment and Opinion of the Fifth Circuit Court of Appeals and for such other and further relief to which he may be justly entitled.

Respectfully submitted,

MARCH H. COFFIELD
SEALE, STOVER, COFFIELD,
GATLIN & BISBEY
P. O. Box 480
950 North Wheeler
Jasper, Texas 75951
(409) 384-3463
SBN: 04491000

Counsel for Petitioner,
Melvin O'Carroll

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the United States Supreme Court bar and counsel of record for the Petitioner herein and that, on the _____ day of March, 1989, three (3) copies of the above and foregoing Petition for Writ of Certiorari were served on each party represented herein, pursuant to United States Supreme Court Rules 19, 21, by depositing same in the United States Post Office, Jasper, Texas, with postage prepaid, Certified Mail, Return Receipt Requested, and properly addressed to counsel of record for Respondent, to wit: Mr. Stuart J. Starry, First InterState Tower, 24th Floor, 1300 Post Oak Boulevard, Houston, Texas 77056, and Mr. Mark Dombroff, 1275 Pennsylvania Avenue, N.W., Suite 301, Washington, D. C. 20004.

MARCH H. COFFIELD

APPENDIX

Melvin O'CARROLL,
Plaintiff-Appellee,

v.

AMERICAN AIRLINES, INC.,
Defendant,

Chaparral Airlines, Inc.,
Defendant-Appellant.

No. 88-2560

Summary Calendar.

United States Court of Appeals,

Fifth Circuit.

Jan. 12, 1989.

Ticket holder brought action against airline for wrongful exclusion from flight. The United States District Court for the Eastern District of Texas, J. Michael Bradford, United States Magistrate, entered judgment on jury verdict in favor of ticket holder. Airline appealed. The Court of Appeals held that Federal Aviation Act preempted state law claim for allegedly wrongful exclusion.

Vacated.

Appeal from the United States District Court for the Eastern District of Texas.

Before CLARK, Chief Judge, JOHNSON, and JOLLY, Circuit Judges.

PER CURIAM:

Defendant Chaparral Airlines appeals the district court's judgment on the jury verdict in favor of the plaintiff. Concluding that the district court lacked subject matter jurisdiction, we vacate.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff Melvin O'Carroll (O'Carroll) held a valid flight ticket issued by Chaparral Airlines (Chaparral) for passage between Portland, Maine and Alexandria, Louisiana. The entire trip was to have taken several hours, and was comprised of three flight segments: Portland to Boston, Boston to Dallas (DFW) and DFW to Alexandria. Early in his journey, O'Carroll met a cousin, Robert Rollins (Rollins), and the two traveled together consuming a number of beers en route. Shortly after O'Carroll and Rollins boarded the Chaparral flight at DFW for the final leg of their journey, a commotion arose on the aircraft. Testimony at trial indicated that O'Carroll and Rollins asked a flight attendant for liquor immediately after boarding and were loud, boisterous and intoxicated. At one point, Rollins advised the pilot that he (Rollins) would "help him fly the plane." During the ensuing chain of events, Chaparral discovered an irregularity with O'Carroll's ticket. A flight attendant asked O'Carroll to deplane and check with the gate

agent regarding the ticket mix-up; O'Carroll, however, uttering obscenities, refused to move. Ultimately, after being summoned by the Chaparral Captain, the police arrived and removed O'Carroll and Rollins from the aircraft. The two were thereafter charged with disorderly conduct and jailed.

O'Carroll brought the instant action in United States District Court asserting various state law claims because of what O'Carroll alleged to be his wrongful exclusion from the Chaparral flight. Jurisdiction of the district court was based entirely on diversity of citizenship. After a trial before a jury, a verdict was returned which awarded O'Carroll $260,273.23 in damages. The Magistrate denied Chaparral's subsequent Motion for Judgment Notwithstanding the Verdict and Chaparral's Rule 12(b)(6) Motion to Dismiss. Thereafter, the Magistrate entered judgment on the jury's verdict and Chaparral timely perfected this appeal.

II. DISCUSSION

Chaparral argues that the state law claims which formed the basis of O'Carroll's action are preempted by federal law. We agree. There are three instances where federal law will be found to preempt state law. First, Congress may expressly preempt state law. *Shaw v. Delta Air Lines,* 463 U.S. 85, 95, 103 S. Ct. 2890, 2899, 77 L.Ed.2d 490, 500 (1983). Second, congressional intent to preempt may be inferred, generally from the pervasiveness of the federal regulatory scheme. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L.Ed. 1447, 1459 (1947). Third, when state law conflicts with federal law or interferes with

the achievement of congressional objectives, preemption occurs even though state law may not be displaced in its entirety. *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43, 83 S. Ct. 1210, 1217, 10 L.Ed.2d 248, 257 (1963); *Hines v. Davidowitz,* 312 U.S. 52, 67-68, 61 S. Ct. 399, 404, 85 L.Ed. 581, 587 (1941). The existence of any of these circumstances is sufficient to establish preemption. *See Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Board,* 467 U.S. 461, 469, 104 S. Ct. 2518, 2523, 81 L.Ed.2d 399, 406 (1984) (summarizing three types of preemption).

There can be no question that the Federal Aviation Act applies to the regulation of air travel. Section 1511 vests an air carrier with broad discretion with respect to whom will be granted or denied passage. Section 1511 reads in part:

> Subject to reasonable rules and regulations prescribed by the Secretary of Transportation, any such carrier may also refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight.

49 U.S.C. App. § 1511(a). The discretion conferred by the above section, while decidedly expansive, is not unfettered. Section 1374 provides that all air carriers must

> provide safe and adequate service, equipment, and facilities . . . [and] establish, observe, and enforce just and reasonable . . . rules, regulations and practices relating to [air travel]. . . . No carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to

> any particular person . . . or subject any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

49 U.S.C. App. §§ 1374(a)(1) & 1375(b). Further, an implied cause of action against an air carrier under section 1374 for abuse of the discretion accorded it by virtue of section 1511 has been recognized. *See Diefenthal v. C.A.B.*, 681 F.2d 1039, 1050 (5th Cir. 1982); *see also Mason v. Belieu*, 543 F.2d 215 (D.C. Cir. 1987) *cert. denied*, 429 U.S. 852, 97 S. Ct. 144, 50 L.Ed.2d 127.

While the pervasive breadth of the Act as discerned from the language quoted above would tend to indicate congressional preemptive intent, there is no need to rely upon inference alone as section 1305, which is entitled "Federal Preemption," expressly preempts state law and reads in pertinent part as follows:

> [N]o State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

49 U.S.C. App. § 1305(a)(1). In view of this explicit manifestation of congressional intent, we conclude that O'Carroll's common law claims are preempted by section 1305 and thus the district court lacked subject matter jurisdiction over the instant action. *See also Cippollone v. Liggett Group, Inc.*, 593 F.Supp. 1146 (D.C. N.J. 1984), *rev'd on other grounds*, 789 F.2d 181. Consequently, we need not reach any other issues raised on appeal.

III. CONCLUSION

Because O'Carroll, in his complaint, alleged only state law based claims, and because we have determined that Congress intended through section 1305 to preempt state law based claims, we conclude that the district court lacked jurisdiction over the instant suit. The judgment of the district court is therefore vacated.

VACATED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2560

Summary Calendar

D.C. Docket No. CA-B-86-1586

MELVIN O'CARROLL,
Plaintiff-Appellee,

v.

AMERICAN AIRLINES, INC.,
Defendant,

CHAPARRAL AIRLINES, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Texas

(Filed January 12, 1989)

Before CLARK, Chief Judge, JOHNSON, and JOLLY, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on

appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is vacated, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bears its own costs on appeal.

January 12, 1989

ISSUED AS MANDATE: February 21, 1989

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2560

MELVIN O'CARROLL,
Plaintiff-Appellee,

v.

AMERICAN AIRLINES, INC.,
Defendant,

CHAPARRAL AIRLINES, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas

(February 9, 1989)

Before CLARK, Chief Judge, JOHNSON, and JOLLY, Circuit Judges.

PER CURIAM:

On petition for rehearing, appellant Melvin O'Carroll contends that 49 U.S.C. § 1506 preserves his state law based negligence claims. Section 1506 reads as follows:

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at com-

> mon law or by statute, but the provisions of this chapter are in addition to such remedies.

49 U.S.C. § 1506. In making this contention, however, O'Carroll overlooks the fact that section 1305, entitled "Federal Preemption" was enacted by Congress well after section 1506. Therefore, we conclude that section 1305 is a clear indication of congressional intent to preempt and is controlling. The petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ SAM JOHNSON
United States Circuit Judge

2-3-89

SUMMARY OF THE RECORD

Chaparral Airlines, Inc. is a commuter airline supplying connecting service to American Airlines under the name "American Eagle." Among its flights is a direct flight from Dallas-Fort Worth Airport (DFW) to Alexandria, Louisiana.

Melvin O'Carroll had been working in Maine and on September 14, 1986, he was traveling from Portland, Maine, back to his home in Oakdale, Louisiana, near Alexandria (Tr. 24, 25, 27, 28).

The ticket on which O'Carroll was traveling on September 14, 1986, is in evidence as Pl. Ex. 1. It cost a total of $444.00, and was prepaid by O'Carroll's employer (Tr. 26, 33). The ticket was signed by O'Carroll as the passenger and was non-transferable and non-refundable (Tr. 26, 33, 34). This ticket covered O'Carroll's entire trip from Portland, Maine, to Alexandria, Louisiana, with legs from Portland to Boston, Boston to DFW, and DFW to Alexandria (Tr. 27).

On the morning of the incident made the basis of this suit, O'Carroll began his trip at 5:30 A.M. (Eastern Time) with a bus ride to the local airport for a flight to Portland (Tr. 31). The trip was scheduled to end with arrival in Alexandria at approximately 9:00 P.M. (Central Time) (Tr. 36). The incident in question occurred at approximately 7:00 P.M. (Central Time) at DFW (Pl. Ex. 5, 6).

While in Boston awaiting his flight to DFW, O'Carroll met his cousin, Robert Rollins (Tr. 32). They flew on the same flight to DFW, but were not seated together (Tr. 34).

During the course of this day-long trip, until he went to Chaparral's terminal area at DFW, O'Carroll drank four or five beers (Tr. 35, 69).

O'Carroll and his cousin, Rollins, boarded Chaparral's flight to Alexandria together and they were assigned seats at the front of the plane, near the cockpit. (Tr. 37-39). O'Carroll had no idea as to what, or how much, Rollins had had to drink during the day. (Tr. 40).

Prior to boarding Chaparral's aircraft at DFW, O'Carroll went through Chaparral's terminal area, and presented his ticket (Tr. 36; Tr. Sup. B-1). O'Carroll's boarding pass is in evidence as Pl. Ex. 2.

As he entered the plane, O'Carroll had to pass the flight attendant, Morris (Tr. Sup. B-1). He sat in his seat (Tr. 38, 39), and aside from asking "When do we get our drinks?" the flight attendant noted nothing about O'Carroll or his conduct, and assumes he remained seated, until the question arose about O'Carroll's ticket (Tr. Sup. B-2, 3).

Just before take-off, the young lady who had taken O'Carroll's ticket prior to boarding, came aboard the plane and told O'Carroll his ticket was no good and that he would have to get off (Tr. 41, 52). Although she had the ticket in her hand, she did not explain what the problem with the ticket was (Tr. 42). She told O'Carroll he would have to take a flight the next day (Tr. 42).

O'Carroll refused to leave the plane because he believed his ticket was good and, since he only had $13.45 in cash, he did not want to be stuck at the airport overnight. (Tr. 41-44; Pl. Ex. 6 [p. 3—"Book-In Report"]).

None of Chaparral's personnel advised O'Carroll that the airline would take care of his overnight expenses if he would deplane to have the ticket checked out (Tr. 47), Chaparral's flight attendant, Morris, did not know the company's policy or procedure for handling such matters (Tr. Sup. B-5). Chaparral's gate attendant, Mary Beth Hopkins, was not called to testify by Chaparral.

The only contact O'Carroll had with the plane captain was when the pilot told O'Carroll the ticket was no good and threatened to call security (Tr. 46). O'Carroll thought such a call would be a good thing since security might be able to straighten matters out (Tr. 46, 47). Chaparral's captain, Steven Zeigler, was not called to testify by Chaparral although he was present in the Courtroom (Tr. 14) and was the "Complainant" on the "Arrest Record" arising out of this incident (Pl. Ex. 5-7).

Before O'Carroll was removed from the airplane by the security personnel, Chaparral's employees had determined that the ticket was in fact valid (Tr. 128; Tr. Sup. B-5, 6). In the meantime, Chaparral's flight attendant, Morris, decided O'Carroll was intoxicated, but made no tests to aid himself in that decision (Tr. Sup. B-6, 7).

Chaparral's second officer, Ramsey, testified about his observations, but he was not shown as a "witness" on the "Arrest Report" arising out of this incident (Pl. Ex. 5-7).

Ramsey's further testimony revealed that O'Carroll was seated throughout the time Ramsey was observing him (Tr. 126). Ramsey did not talk to O'Carroll (Tr. 127). Ramsey's observation of O'Carroll lasted 10 to 15 seconds (Tr. 127, 129).

The initial complaint made to DFW police by Captain Zeigler was that O'Carroll was "disorderly and intoxicated" (Tr. Sup. B-14; Pl. Ex. 6, 8). However, O'Carroll was not charged with "intoxication" (Tr. Sup. B-22, 25).

The initial "Arrest Report" was changed by Officer Savino, as to the "Narrative" in Section 41 of the Report, to remove references to O'Carroll being "disorderly" and "intoxicated" (Pl. Ex. 5-7). O'Carroll was shown as being "Non-Ticketed," and having "none" under "Ticket No." (Pl. Ex. 5-7 [Section 42]). However, there is no dispute that he was ticketed and his ticket is shown on the "Book-In Report" (Pl. Ex. 6).

The "Arrest Record" shows, that in the officer's opinion, O'Carroll was "Active" (as opposed to "Unconscious," "Passive" or "Hostile") and "Drinking" (as opposed to "Drunk") (Tr. Sup. B-23; Pl. Ex. 5-7 [Section 43, 44]).

O'Carroll was never told by the Captain, or any of Chaparral's personnel, that they thought he was drunk, or that he was a threat to the safety of the airplane or the other passengers (Tr. 48, 49).

O'Carroll left the airplane after being told by one of the security officers that Captain Zeigler still claimed his ticket was no good and after the officer put his hand on his blackjack and said "Now, you get up and come on" (Tr. 48, 50, 51). O'Carroll was taken to the police car where he was frisked and handcuffed, then taken to the DFW jail (Tr. 52, 53).

When he was checked in at the DFW jail, O'Carroll had $13.45, his plane ticket and no knife or whiskey (Tr. 54; Pl. Ex. 6). He was fingerprinted, had a "mug

shot" taken and was placed in an 8-foot-square cell with 3, later 4, other men (Tr. 55). O'Carroll was in that cell for about 3 hours, and, although he was cold, was refused his jacket (Tr. 55, 56). He was then moved to another, bigger cell (Tr. 56). No tests were performed on him by the police to determine if he was intoxicated (Tr. 56).

Because the DFW personnel told his employer that he had been arrested for being drunk and disorderly, O'Carroll's employer would not post bond for him and refused his later call for help (Tr. 56, 58).

Sometime around 1:30 or 2:00 A.M. on the morning of September 15, 1986, O'Carroll was again handcuffed and moved to the Grapevine, Texas, City Jail (Tr. 58; Pl. Ex. 7). There, he was fingerprinted and photographed again (Tr. 58).

Prior to this incident, O'Carroll had never been frisked, handcuffed or put into a police car (Tr. 53). Prior to this incident, O'Carroll had never been fingerprinted or booked into a jail (Tr. 55). At the time of his arrest and book-in, O'Carroll had no outstanding warrants, holds or record (Tr. Sup. B-19, 26).

While O'Carroll was being jailed, his family was awaiting his arrival at the Alexandria airport (Tr. 95). Although Mrs. O'Carroll inquired about his situation at Chaparral's ticket counter there, she was given no information (Tr. 95).

Later the morning of September 15th, O'Carroll was allowed another telephone call and was able to contact his wife, who borrowed the money and posted his bond (Tr. 60). He was released from the Grapevine jail on

the afternoon of September 15, 1986 (Tr. 60). He walked approximately two miles from the jail back to Chaparral's terminal at DFW (Tr. 60).

O'Carroll then flew to Alexandria on the same Chaparral flight from which he had been removed 24 hours earlier, using the same ticket alleged to have been invalid the day before (Tr. 61, 62).

This suit, based on Texas common law, was filed on November 12, 1986 (R. 1). O'Carroll contended that as a passenger aboard Chaparral's aircraft, he was entitled to Chaparral's exercise of a high degree of care, and that such duty was breached when he was accused of having an invalid ticket, then being intoxicated, then removed from the aircraft and arrested at the direction of Chaparral's personnel (Tr. 195).

This case was tried in the Court of Magistrate J. Bradford in the Eastern United States District of Texas, before a jury on August 25 and 26, 1987 (Tr. 2, 149).

Following presentation of the evidence, argument of counsel and submission of the Court's charge, the jury found Chaparral negligent, O'Carroll not negligent, and awarded past damages of $75,000.00 and future damages of $177,500.00 (Tr. 213).

Following the filing of post-trial motions and the hearings thereon, the Trial Court entered judgment on the jury's verdict on March 14, 1988 (R. 561, 562).

The Fifth Circuit Court of Appeals vacated that judgment on January 12, 1989, and denied O'Carroll's Petition for Rehearing on February 9, 1989.